



DEPARTMENT OF THE NAVY

BOARD FOR CORRECTION OF NAVAL RECORDS

2 NAVY ANNEX

WASHINGTON DC 20370-5100

TRG

Docket No: 8996-97

30 November 1999

[REDACTED]

Dear [REDACTED]

This is in reference to your application for correction of your naval record pursuant to the provisions of title 10 of the United States Code section 1552.

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 23 November 1999. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application, together with all material submitted in support thereof, your naval record and applicable statutes, regulations and policies.

After careful and conscientious consideration of the entire record, the Board found that the evidence submitted was insufficient to establish the existence of probable material error or injustice.

The Board found that you reenlisted in the Navy on 23 January 1992 in the rate of HT1 (E-6). At that time, you had completed about 12 years of active service on prior enlistments.

The record shows that in February 1994 SN Christine M. H... made an accusation that you had sexually assaulted her and an investigation was begun on 28 February 1994. The investigator interviewed you, SN H, HT2 Jackie E... and BM3 Harry D. .... The investigator concluded as follows:

It is the opinion of this investigator that (he) did in fact grab (SN H) and attempt to bite and kiss her on ... 27 Feb 94, due to the pattern that has been discovered through the interviews with H and E. (He) is a very aggressive individual that can not take no for an answer. During (his) interview, (the investigator) observed (his) body language as nervous and deceptive. ....

Subsequently, additional statements were obtained from other crewmembers.

On 30 March 1994 you received nonjudicial punishment (NJP) for indecent assault. The punishment imposed included forfeitures of pay totaling \$500 and a reduction in rate from HT1 to HT2 (E-5). You appealed the NJP, essentially contending that SN H was lying, and submitted statements attesting to her poor character. In his endorsement on the appeal, the commanding officer stated, in part, as follows:

.... (He) puts forth his belief that because the victim ... was friendly to him and sought his signature on a qualification card, she could not have felt threatened by his past behavior. This is simply not the case. (She) was clear in her testimony, (that he) had agreed to keep their relationship strictly professional, and she felt safe in asking him to sign off her damage control qualifications. By asking for a qual signature she certainly was not consenting to be sexually attacked and bit(ten) on the chest ...

.. (He) has submitted enclosures .... which attack the victim's character. These statement may have been relevant if the other witnesses did not testify. These other witnesses .... all testified that (he) either physically advanced on them or verbally taunted them with sexual remarks. In their cases, (he) was told to cease the behavior and he complied. He was on notice that his behavior was offensive yet instead of completely terminating this behavior he sought out others who might not find it offensive.

.. (He) asserts that all witness statements, except for HT3 T..., were false. Although he admits the physical contact with T, (he) states in his appeal that this is normal "play" for his shop. It is clear from this statement that (he) does not understand the Navy's sexual harassment policy or his role as a Leading Petty Officer in creating an appropriate work environment. Also, no evidence exists to show any connection between the other witnesses or any secondary gain they may have had for falsifying their accounts. In fact, some of the witnesses were reluctant to come forward because they believed they had handled their situation appropriately. ....

On 2 May 1994, the NJP appeal was denied by the general court-martial convening authority.

On 3 April 1994, you were notified of separation processing due to commission of a serious offense. At that time, you elected to have your case heard by an administrative discharge board

(ADB). The ADB met on 24 May 1994 and found, by a two to one vote, that you had committed a serious offense as alleged, and unanimously recommended a general discharge. Evidence was presented at the ADB that your accuser had received NJP on 4 May 1994 for disobedience of orders by having sexual intercourse on board ship, and theft of \$300 from a shipmate. The dissenting member submitted a statement to the effect that he did not believe your accuser and noted that one of the other witnesses against you was of questionable character. The entire board recommended a general discharge.

Subsequently, your counsel submitted a letter of deficiencies contending that the findings of the ADB were erroneous and unjust. Counsel pointed out, in effect, that the Navy's policy of zero tolerance towards sexual harassment had created an atmosphere which precluded a fair hearing in your case. He also noted the evidence at the ADB which showed that your accuser was unbelievable. After reviewing the ADB and the letter of deficiencies, the commanding officer strongly recommended that you be discharged stating, in part, as follows:

... Counsel for the respondent has consistently relied on victim character assassination in an attempt to prove Respondent did not commit these offenses. The victim, SN H has been involved in stealing money and an AT&T number from her female shipmates, however, these events occurred after the sexual harassment and assaults were committed .... (She) has received appropriate punishment for all offenses. She received no leniency as a result of her allegations and testimony concerning (his) misconduct. .... Additionally, an investigation into the assault/sexual harassment allegation against (him) revealed a pattern of inappropriate behavior, including sexual assaults with junior female subordinates. Statements and testimony by these other victims were brought forward at the administrative board to show a common scheme or "modus operandi" by (him) in his dealings with female subordinates. All evidence brought forward was subject to objection, cross-examination and argument by a qualified military attorney.

... Counsel for the Respondent and the Recorder conducted voir dire in this area. All board members stated that they were fair and impartial, and would consider all the evidence before making any determinations. Counsel for the respondent did not challenge for cause any board member. The fact that one member dissented demonstrates the lack of sexual harassment hysteria at this board. ....

On 28 October 1994, the discharge authority approved the recommendations of the ADB and the commanding officer, and directed a general discharge by reason of misconduct. You were so discharged on 28 November 1994.

Your current counsel essentially makes the same arguments concerning the credibility of the witnesses against you, and further alleges that one of the ADB members was a friend of the recorder and discussed the case prior to the convening of the ADB. In his conclusion counsel noted that the command investigator noted that SN H "... has a problem understanding what the truth is. She does not know ... when she is telling the truth or not." Counsel contends that (her) testimony was insufficient to sustain the findings and recommendations of the board.

Concerning the NJP the Board noted that the allegations against you were supported by the testimony of others which showed a pattern of sexual harassment. The Board was aware that the standard of proof at an NJP is a preponderance of the evidence, and the commanding officer believed the witnesses against you. The Board found that a preponderance of the evidence supported the allegations against you. Therefore, the Board concluded that the commanding officer did not abuse his discretion when he imposed NJP for the offenses. The Board further concluded that the punishment imposed was not too severe when weighed against the offense committed.

Concerning the administrative discharge processing, the Board noted the extensive record of the ADB, which showed that the ADB members were subject to voir dire, all the witnesses were subjected to cross-examination, other evidence was carefully reviewed and arguments were presented in support of your case. However, two members of the ADB concluded that you had committed misconduct. In reaching its decision, the Board was aware that a determination as to the credibility of the witnesses is a key factor in the case. The record shows that the commanding officer at the NJP and the ADB were able to observe the witnesses and three of the four individuals who considered your case concluded that you had committed misconduct.

The Board specifically noted that the ADB proceedings reflect that during voir dire your military counsel apparently make no effort to determine whether any of the voting members knew any of the participants, such as the recorder. Further the Board concluded that you have not shown that the members of the ADB who allegedly spoke with the recorder was biased against you. The Board concluded that the discharge was proper as issued and no change is warranted.

Accordingly, your application has been denied. The names and

votes of the members of the panel will be furnished upon request.

It is regretted that the circumstances of your case are such that favorable action cannot be taken. You are entitled to have the Board reconsider its decision upon submission of new and material evidence or other matter not previously considered by the Board. In this regard, it is important to keep in mind that a presumption of regularity attaches to all official records. Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of probable material error or injustice.

Sincerely,

W. DEAN PFEIFFER  
Executive Director